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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re the Marriage of CAMERON and NANIEA
SCHEIBER.

C087298

CAMERON SCHEIBER,

(Super. Ct. No. 16FL03863)

Appellant,

v.

NANIEA SCHEIBER,

Respondent.

Cameron Scheiber (husband) appeals from an order granting Naniea Schieber's (wife's) request for attorney fees. On appeal, husband contends the trial court lacked jurisdiction to "award [wife]'s former attorney fees and costs after [wife] substituted him out of the case and instructed him to 'stop any and all action regarding [her] divorce.' " Husband further contends the court prejudicially erred in granting the request without a current income and expense declaration from wife. Wife did not file a responsive brief.

We conclude the trial court acted within its jurisdiction, and any error in granting the request without a current income and expense declaration was harmless. We affirm.

BACKGROUND

On June 29, 2016, husband filed a petition for dissolution of marriage. Wife filed a response, along with a request for order (RFO) seeking child and spousal support, as well as a request for \$1,750 in need-based attorney fees. Husband asked the court to defer the issue of fees.

The trial court heard wife's RFO on August 17, 2016, and ordered husband to pay \$788 each month in child support and \$1,620 each month in spousal support, both to begin "upon move out." The court deferred wife's request for fees.

On September 14, 2016, husband filed an RFO, seeking orders related to property, support, and sanctions. Wife opposed his request for sanctions and asked for \$5,000 in need-based fees and sanctions. The trial court deferred the issue of sanctions but denied wife's request for fees.

On November 21, 2016, wife filed another RFO. Among her requests was \$8,000 in need-based attorney fees. Husband asked the court to deny the request for fees, or defer the issue until trial; the court deferred the fees issue until trial. The court set trial for March 17, 2017, and the mandatory settlement conference for March 9, 2017.

In advance of the conference, wife filed a statement of issues and contentions, in which she said she had incurred \$17,500 in attorney fees to date. In his statement of issues and contentions, husband asked the trial court to order the parties to pay their own fees. At the conference, the court continued the trial date to June 22, 2017.

Prior to trial, husband filed a supplemental statement of issues and contentions, in which he again asked the trial court to order the parties to pay their own attorney fees. Wife also filed a supplemental statement of issues and contentions wherein she reiterated her request for fees but indicated she now had incurred more than \$20,000 in attorney fees.

The case went to trial on June 22, 2017 (Tedmon, J.). The court took judicial notice of husband's three income and expense declarations--the latest filed in May 2017. It also took judicial notice of wife's June 2017 income and expense declaration. The court issued a decision on August 18, 2017. On the issue of attorney fees, it ruled: "With regard to disparity in income and ability to pay, based on the Court's calculation, [husband's] monthly income exceeds [wife's] by \$6,646.00. . . .

"[Wife's] counsel, in his Supplemental Statement of Issues, represented his attorney's fees as of May 22, 2017, total more than \$20,000. However, [her] counsel has not provided the Court with any specific information to support his request for attorney's fees. . . . Taking all factors into account, the Court finds there is a disparity in income, need is established, and [husband] has the ability to pay [wife's] attorney's fees, either in whole or part.

"[Wife's] counsel may file a[n] [RFO] and serve it on opposing counsel with the sole issue at the hearing being what amount of attorney's fees and costs is just and reasonable in this case. The [RFO] shall be filed within 10 days."

On October 4, 2017, wife filed an RFO for attorney fees (October RFO), asking for \$22,000 in fees and \$1,040.22 in costs.¹ Husband opposed the request; he argued the RFO was not timely filed and was not accompanied by a current income and expense declaration. In November, the trial court (McBrien, J.) denied wife's request for fees without prejudice on the ground that no income and expense declaration was filed with her RFO. The following day, November 9, 2017, wife filed a new income and expense declaration.

¹ The declaration refers to attached exhibits A through E; those attachments are not included in the record on appeal.

On February 14, 2018, wife's attorney Jeff Klink filed another RFO (February RFO) for fees; wife did not sign the request. Klink attached his own declaration to the RFO, wherein he described his hourly rate, the hourly rate of the attorney representing wife before him, the nature of the litigation, and the hours each attorney spent on the case through the trial. He indicated wife incurred more than \$44,257.50 in attorney fees and argued an "award of fees of at least \$22,000 is just and reasonable to equitably allocate responsibility for [wife]'s fees between the parties."

On February 28, 2018, wife executed a substitution of attorney, indicating she would be representing herself going forward; it was filed with the court on March 15, 2018. On March 20, 2018, Klink asked the court to continue the hearing on the February RFO.

In support of his request for a continuance, Klink submitted a declaration in which he said that prior to his filing the February RFO, wife did not respond to his repeated attempts to obtain a current income and expense declaration. Klink argued that a current declaration was not necessary because the prior court (Tedmon, J.) had "already made the requisite finding of [wife's] *need* and [husband's] *ability to pay* a fee award in its Ruling dated Aug. 18, 2017" Thus "the sole purpose of a further hearing was to provide more specific evidence of the itemized attorney fee *amounts*, and provide the required declaration from *the Attorney* to support proper determination of a reasonable fee award."

On March 20, 2018, Judge Tedmon heard Klink's motion to continue. Judge Tedmon granted the continuance and ordered the parties to submit briefs on the following issues: (1) whether and how *In re Marriage of Borson* (1974) 37 Cal.App.3d 632 (*Borson*), applied to this case; (2) whether current income and expense declarations need to be filed in order for the court to consider the "current request for attorney fees"; and (3) the amount of fees and costs requested. Wife was not present at the hearing.

In response to the court's order, husband declared it to be his understanding that wife did not consent to Klink's pursuit of the fees award; thus, the court lacked jurisdiction to rule on the February RFO. In addition, husband claimed the lack of a current income and expense declaration by wife doomed the RFO. He calculated the disparity in their income to be only \$1,985 and challenged the reasonableness of the fees requested. He filed his own income and expense declaration.

Husband's attorney, Patrick Kubasek, echoed husband's declaration in his supporting points and authorities. Kubasek argued the court lacked jurisdiction to grant the request for fees because there was no evidence Klink had wife's express or implied consent to pursue the request. Kubasek noted that wife did not sign the February RFO and had not provided Klink with a current income and expense declaration. Kubasek also argued that a current income and expense declaration was required to accompany any request for fees and that without one the court was precluded from ruling on the RFO.

On April 23, 2018, the court heard argument on the February RFO. At that hearing, Kubasek told the trial court (Tedmon, J.) that on February 28, 2018, wife sent Klink an e-mail telling him to stop all divorce proceedings. Kubasek gave the court a copy of that message; Klink did not object. The court reviewed the message:

"THE COURT: It says, 'Please stop any and all action regarding my divorce process.' I don't know what that means. Do you, Mr. Kubasek?

"MR. KUBASEK: I would --

"THE COURT: You can assume or guess, but you don't know, do you?

"MR. KUBASEK: I don't know for certain."

After hearing argument from both parties, the trial court found it had "already made a determination based on the income and expense declarations provided that there was need and ability to pay." The court also found that prior to her February 28 e-mail, wife consented to the February RFO, and there was nothing "before the Court that would

indicate that [wife] specifically objected to Mr. Klink's pursuing of the attorney's fees" Finally, the court found the amount of fees requested was reasonable.

Accordingly, the trial court ordered husband to pay wife's attorney fees in the amount of \$22,000 and costs in the amount of \$1,040.22. Husband appeals from this order.

DISCUSSION

Husband raises two arguments in support of his appeal. First, he claims the trial court lacked jurisdiction to rule on the February RFO because wife did not give Klink consent to pursue the fee award after she discharged him as her attorney. Second, husband claims the court prejudicially erred in ruling on the February RFO without a current income and expense declaration from wife.

I

Jurisdiction

Husband contends the trial court lacked jurisdiction to rule on the February RFO because wife discharged Klink prior to the hearing and directed him to take no further action in the divorce process. We are not persuaded.

"It is well settled that the right to attorney's fees and costs under [former] Civil Code section 4370 [now Fam. Code, § 2030] belongs to the client spouse and accrues to the benefit of the attorney only indirectly. Moreover, the right to such fees and costs belongs to the spouse to whom they were awarded, not to the attorney, even if the award is made directly payable to the attorney. Instead the attorney must institute an independent action against the client to recover attorney's fees on his or her own behalf." (*In re Marriage of Tushinsky* (1988) 203 Cal.App.3d 136, 142.) In a dissolution proceeding, however, there are limited circumstances in which a party's former attorney can seek fees on a party's behalf. The Second Appellate District, Division Three addressed these circumstances in *Borson, supra*, 37 Cal.App.3d 632.

In *Borson* a wife discharged her attorneys during dissolution proceedings. (*Borson, supra*, 37 Cal.App.3d at p. 636.) After their discharge, the attorneys moved for permission to withdraw and requested on the wife's behalf that the husband be directed to pay them additional attorney fees. (*Ibid.*) The wife did not expressly consent to the motion for fees, but she did not object. (*Id.* at pp. 636, 638.) At the hearing, the trial court granted the motion to withdraw and postponed consideration of the fee request. (*Id.* at p. 636.) The wife subsequently substituted in new counsel and withdrew her consent to proceed with the fee request made by the discharged attorneys. (*Id.* at p. 637.) New counsel then negotiated a settlement under which the former attorneys were allowed to recover fees. (*Ibid.*) The husband appealed, asserting that the award of fees was in excess of the trial court's jurisdiction. (*Ibid.*)

The appellate court noted that because the request for fees had been made before new counsel substituted in, the former attorneys continued to represent the wife for purposes of winding up the relationship, which included making the fee motion on her behalf. (*Borson, supra*, 37 Cal.App.3d at p. 637.) The appellate court also found the wife's former attorneys "reasonably believed" they had the wife's "implied consent" to pursue the fee request, despite the severed relationship. (*Id.* at pp. 637-638) The court found that at the time her former attorneys filed the request for fees, the wife had "no disagreement with her attorneys over her former husband paying these additional fees and costs," and they were still her attorneys of record. (*Id.* at pp. 637-638.)

Moreover, the wife herself requested attorney fees and costs in her verified petition for dissolution. (*Borson, supra*, 37 Cal.App.3d at p. 638.) In support of her request, the wife "personally alleged in her declaration . . . that she needed these fees and costs and that [her former husband] had the ability to pay them." (*Id.* at p. 638.) The appellate court also noted that the trial court granted the attorneys' motion to withdraw and simultaneously reserved jurisdiction over the fee motion. (*Ibid.*)

Finally, the appellate court noted that the wife's objection to the fee motion surfaced only at the time the motion was heard. (*Borson, supra*, 37 Cal.App.3d at pp. 637-638.) The court reasoned that because she failed to object earlier, "she acquiesced in their having made the motion for her." (*Id.* at p. 638.)

Here, wife personally invoked the court's jurisdiction to award need-based fees in her initial RFO.² Judge Tedmon granted wife's request for fees, but asked for additional information from Klink regarding the amount of fees necessary and reasonable for the litigation. Klink subsequently filed two RFOs on wife's behalf in an effort to get that additional information before the court: the October and February RFOs. He filed both while he remained counsel of record for wife. Thus, even though wife executed the substitution of counsel on February 28, 2018, two weeks after the February RFO was filed, Klink's continued pursuit of that fee award falls squarely within the "winding up" of their attorney-client relationship. (See *Borson, supra*, 37 Cal.App.3d at p. 637.)

Additionally, there is ample evidence to support the finding that Klink reasonably believed he had wife's implied authority to pursue that fee award. Not only did he file the initial RFO with wife's consent, she never objected to his efforts to obtain a ruling on the amount of the award. She did not appear at the November 8, 2017, hearing on the October RFO and object. In fact, the next day she signed an updated income and expense declaration to support Klink's efforts. She did not appear at the March 20, 2018 hearing to continue the February RFO and object; nor did she appear at the April 23, 2018 hearing on the February RFO and object.

Husband argues wife's non-participation after submitting the November 2017 declaration and her February 26, 2018 message to "stop any and all action regarding my

² Wife was represented by different counsel at the time she filed her response to the petition and initial RFO. Klink included that counsel's time and hourly rate in his declaration in support of the fee award.

divorce process,” was sufficient to give Klink notice that he no longer had her authority to pursue the fee award. We disagree, but even were we to assume that wife’s conduct message could be interpreted as her objecting to Klink’s pursuit of the fee award, that objection came too late in the process to be legally effective. (See *Borson, supra*, 37 Cal.App.3d at p. 639.)

II

Income and Expense Declaration

Husband further contends the trial court erred in ruling on the February RFO because the court did not have a current income and expense declaration from wife on file. We conclude any error was harmless.

California Rules of Court, rules 5.92(b)(2) and 5.427(b)(1)(C) require a party seeking an order for attorney fees and costs to complete and file a “current” form FL-150, Income and Expense Declaration. Rules 5.260(a)(3) and 5.427(d)(1) define “current” in this context to mean the form has been completed within the past three months providing no facts have changed and specify that the form “must be sufficiently completed to allow the court to make an order.” (Cal. Rules of Court, rule 5.260(a)(3).)

“While a Rule of Court phrased in mandatory language is generally . . . binding on the courts . . . departure from it is not reversible error unless prejudice is shown.” (*In re Marriage of Steiner & Hosseini* (2004) 117 Cal.App.4th 519, 524.)

When Klink filed the February RFO, wife’s November 2017 income and expense declaration was her most recent such declaration on file with the court. It was filed on November 9 and the RFO was filed on February 14--slightly more than three months later. The rules therefore required an updated declaration accompany the RFO.

Husband, however, has failed to demonstrate how he was prejudiced by the court’s ruling without benefit of a new declaration. He argues only that “there could be no

certainty” that wife’s need for fees and husband’s ability to pay those fees “remained the same 10 months later.”³

Moreover, relative to attorney fees, income and expense declarations are used to demonstrate the parties’ relative need and ability to pay. (cf. *Burkle v. Burkle* (2006) 144 Cal.App.4th 387, 403 [harmless error to seek fees as a Family Code section 271 sanction without filing an income and expense declaration because no need to demonstrate financial need for sanctions].) Klink was pursuing wife’s request for need-based attorney fees under Family Code section 2030, but the court already determined wife’s need for fees and husband’s ability to pay those fees “in whole or in part.” Therefore, the “sole issue” before the court on the February RFO was “what amount of attorney’s fees and costs is just and reasonable in this case.” (Fam. Code, § 2030, subd. (a)(1).) The parties’ income and expense declarations were not required for the court to make that determination. (See *In re Marriage of Kelso* (1998) 67 Cal.App.4th 374, 385 [courts *may* consider various factors including the nature of the litigation, its complexity, the amount involved, the financial circumstances of the parties, the legal skill involved, and whether counsel’s skill and effort were wisely devoted to the expeditious disposition of the case].) Husband has failed to show prejudice.

³ To the extent husband is suggesting the parties’ relative financial circumstances had changed, rendering the court’s August 18, 2017 award of need-based attorney fees unwarranted, he did not make that argument in the trial court, nor did he offer evidence in the trial court to support that argument.

DISPOSITION

The April 24, 2018 order of the trial court is affirmed. Costs on appeal are awarded to respondent. (Cal. Rules of Court, rule 8.278 (a).)

 /s/
Duarte, J.

We concur:

 /s/
Blease, Acting P. J.

 /s/
Murray, J.